International Union of Operating Engineers, Local 12, AFL–CIO and Winegardner Masonry, Inc. and Southern California District Council of Laborers and its Affiliated Locals 220, 300, 439, 507, 585, 591, 652, 783, 802, 806, 1082, and 1184. Case 21–CD–634

August 31, 2000

DECISION AND DETERMINATION OF DISPUTE BY CHAAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The charge in this 10(k) proceeding was filed on April 20, 2000² by the Employer, Winegardner Masonry, Inc. (Employer). The charge alleges that the Respondent, International Union of Operating Engineers, Local No. 12 (Operating Engineers), violated Section (8)(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Operating Engineers rather than to employees represented by Laborers International Union of North America, Local No. 1184 (Laborers). The hearing was held on May 24 and June 2 before hearing officer David Selder.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer and Laborers stipulated that the Employer, a California corporation, is a masonry contractor with its principal offices located at 32147 Dunlap Boulevard, Suite A, Yucaipa, California, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Operating Engineers would not stipulate to any commerce information concerning the Employer. According to record testimony, during the year prior to the hearing, the Employer has purchased and received materials and supplies valued in excess of \$50,000 directly from points outside the State of California and has received gross revenues in excess of \$500,000. Based on record testimony, the Board finds that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. All parties stipulated that Operating Engineers and Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is a masonry contractor operating in Southern California. The Employer is signatory to a collective-bargaining agreement between the Executive Council of the Mason Contractors' Exchange of South-

ern California, Inc. and the Southern California District Council of Laborers. The Employer does not have a contract with Operating Engineers. The work in dispute in this case is located on property owned by Walt Disney Imaging (WDI) in Anaheim, Califonia. WDI hired MBK, Inc. as the general contractor for the construction of a new AMC Theatre (the site). MBK, Inc., in turn, subcontracted with the Employer to perform masonry construction on the theatre. The Employer began work on the project in April 2000.

In 1997, the Employer purchased a crane to work on larger masonry projects. Since then the machine has been operated solely by bricktender Greg Walker, an employee represented by Laborers. In mid-April 2000, the Employer transported the crane to the site because it was needed to lower materials into the basement of the theatre.

Walker testified that on April 19, Ronnie Edwards, a representative of Operating Engineers, visited the site and spoke with Walker, who was operating the Employer's crane. Edwards asked Walker if he was a member of a union, and Walker responded that he was represented by Laborers. According to Walker, Edwards told him that an employee represented by Operating Engineers should be operating the crane and that Walker could not operate it anymore.

After speaking with Walker, Edwards spoke with Dennis Bartholomay, the Employer's foreman on the site. According to Bartholomay, Edwards told him that an employee represented by Operating Engineers should be operating the crane, and that Bartholomay should either remove Walker from the crane or cease to operate it. Walker testified that he overheard Edwards tell Bartholomay that Operating Engineers would "throw up a picket" if the Employer did not replace Walker with an employee represented by Operating Engineers or remove the crane from the job. Edwards testified that he told Bartholomay that he should have an employee represented by Operating Engineers on the crane, but denied saying that the Operating Engineers would picket if Walker were not removed from the crane.

Finally, Edwards spoke with Mike Bradley, the superintendent on the site for MBK, Inc. According to Bradley, Edwards told him that an employee represented by Operating Engineers should be operating the crane, and that "it would be a shame to have to put a picket on the job." Immediately following his conversation with Edwards, Bradley told Bartholomay to cease operating the crane. According to the testimony of Bradley and Walker, Bartholomay folded the crane up, and it sat idle on the site for the next 3 days. Edwards testified that in speaking to Bradley, he referred to a picket by the Painters Union, which Bradley might have misconstrued as a threat to picket by Operating Engineers.

Carolyn Winegardner, president of the Employer, testified that on April 20, she sent a letter to Bradley, which

¹ Name appears as amended at the hearing.

² All dates are in 2000, unless otherwise stated.

stated that she intended to resume operation of the crane immediately, with Walker as operator. According to Winegardner, after she sent the letter to Bradley, he called her and told her that he had received another threat from Operating Engineers. Bradley also informed Winegardner that if a strike occurred, the Employer would be responsible for all costs.

On April 20, Winegardner filed charges against Operating Engineers on behalf of the Employer.

Edwards testified that on or around April 21 he called Alan Rose, Operations Manager for WDI, and informed him that the Employer's crane was not being operated by an employee represented by Operating Engineers, and that Rose said he would look into the matter. According to Edwards, a few days later, Rose called Edwards and told him that the crane had been removed. Edwards testified that he did not say anything to Rose concerning a picket line.

According to Winegardner, on April 24, she received a call from Gordon Winn, Project Manager of MBK, Inc., in which he told her that Matt May of WDI had informed him that there would be a strike unless the crane was removed from the site. Winn also sent Winegardner a letter on April 24, in which he informed her that all costs incurred from a strike would be the responsibility of the Employer. Bradley testified that May told him that there would be a strike unless the crane was removed from the site.

On April 25, Winn sent a letter to Winegardner, stating that Rose and Randy Kalish of WDI told him that they had received a call from Operating Engineers threatening to strike if the crane were not removed from the site that afternoon. Bradley testified that Rose told him that he had been threatened in a phone conversation by a representative of Operating Engineers. Bradley further testified that Rose ordered that the crane be removed from the site.

On April 25, Winegardner had the crane removed from the site and transported back to the Employer's headquarters in Yucaipa.

B. Work in Dispute

The work in dispute, as stated in the notice of hearing, involves the operation of the crane used to move masonry and other supplies at the AMC Theatre construction site located at Disneyland in Anaheim, California.

C. Contentions of the Parties

1. Employer

The Employer contends that a jurisdictional dispute exists, that there is no agreed upon method for resolving such disputes, and that Operating Engineers' motion to quash the notice of hearing should be denied. The Employer contends that there is reasonable cause to believe that Operating Engineers violated Section 8(b)(4)(D) of the Act and that the work in dispute should be awarded to employees represented by Laborers.

The Employer contends that its collective-bargaining agreement between the Executive Council of the Mason Contractors' Exchange of Southern California, Inc. and the Southern California District Council of Laborers covers the work in dispute and that the Employer properly assigned the work to an employee represented by Laborers. In addition to the collective-bargaining agreement, the Employer contends that employer preference and past practice, relative skills and safety, industry practice, and economy and efficiency of operations favor an award of the disputed work to employees represented by Laborers. The Employer argues that the Board should issue a broad order encompassing the operation of the Employer's crane at all future job sites.

2. Laborers

Laborers contends that a jurisdictional dispute exists between the two unions, that there is no agreed upon method for solving jurisdictional disputes, and that Operating Engineers' motion to quash should be denied. Laborers takes no position as to whether there is reasonable cause to believe that Operating Engineers violated Section 8(b)(4)(D). Laborers contends that if the Board does find reasonable cause to believe that Operating Engineers violated Section 8(b)(4)(D) of the Act, however, then the work in dispute should be awarded to employees represented by Laborers on the basis of the applicable collective-bargaining agreement, employer preference and past practice, industry practice, and economy and efficiency of operations. Laborers takes no position as to whether the Board should issue a broad or narrow order.

3. Operating Engineers

Operating Engineers contends that the Notice of 10(k) Hearing should be quashed and the case dismissed on the basis that the dispute has been adjusted pursuant to a handshake agreement which exists between Disney and the Building Trades Department, and that therefore there are currently no competing claims for the disputed work. Operating Engineers also contends that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated.

If the Board should determine that the dispute is properly before the Board for determination, Operating Engineers contends that the work in dispute should be awarded to employees represented by Operating Engineers based on the factors of area and industry practice, economy and efficiency of operations, and relative skills. Operating Engineers also contends that the jurisdictional award should be limited to the work in dispute at the AMC Theatre Project.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.

Operating Engineers contends that there are not active competing claims to the disputed work, since the crane has been removed from the site. Winegardner testified, however, that she removed the crane from the site after she received the April 25 letter from Winn, advising her that Operating Engineers had informed Rose and Kalish that, if the crane were not removed by the end of the day, Operating Engineers would picket the project on April 26. According to the testimony of Bradley, Winegardner, Walker, and Bartholomay, the crane is still needed at the AMC Theatre Project, and, once the current situation has been resolved, it is likely that the Employer will resume operation of the crane at the site. Moreover, the record shows that Edwards, a representative of Operating Engineers, asserted to Walker, Bartholomay, and Bradley that the work currently assigned to an employee represented by Laborers should be assigned to an employee represented by Operating Engineers. Based on this evidence, we find that there are competing claims for the disputed work.

Operating Engineers also asserts that there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. Bradley testified that on April 19 Edwards told him that "it would be a shame to have to put a picket on the job." Edwards denies making such a statement. Walker and Bartholomay, however, testified that immediately after Bradley spoke with Edwards, he ordered that Bartholomay cease operation of the crane. According to Bradley and Walker, Bartholomay then folded up the crane and put it away for the next 3 days. Walker also testified that he overheard Edwards tell Bartholomay that "it would be shame to have to put a picket on the iob." While Edwards denies mentioning anything about a picket to Bartholomay, he testified that he told Bartholomay that an Operating Engineer, rather than a Laborer, should be operating the crane.

In addition to the testimony of Bradley and Walker concerning threats made to or overheard by them, the record contains further accounts of threats made by Operating Engineers.³ Winn informed Winegardner in a letter dated April 25 that Rose and Kalish had received a threat to picket in a phone conversation with a representative of Operating Engineers. Bradley testified that Rose also told him that he had received a threat in a phone conversation with a representative of Operating Engi-

neers. Bradley also testified that Rose ordered that the crane be removed from the site. While Edwards denies making any sort of threat, he testified that he had two phone conversations with Rose on or around April 21. On April 24, Winn sent a letter to Winegardner stating that May had received a threat from Operating Engineers. Bradley testified that May directly told him that he had received a threat from Operating Engineers.

Based on the evidence in the record, and without any requirement to resolve conflicts in the testimony,⁴ the Board finds reasonable cause to believe that Operating Engineers violated Section 8(b)(4)(D).⁵

Operating Engineers also contends that there is an agreed on method for solving jurisdictional disputes concerning this project, citing a "Handshake Agreement" between Disney and the Building Trades. There was no testimony as to which building trades were encompassed in this agreement. Winegardner testified that the Employer is not bound by any jurisdictional dispute settlement process with the two unions. Based on the above considerations, we find that the record fails to establish that there is an agreed upon method for solving jurisdictional disputes between the Employer, Operating Engineers, and Laborers.

Accordingly, we find that the dispute is properly before the Board for determination and deny Operating Engineers' motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

The parties stipulated that there is no Board certification regarding the work in dispute. The Employer does not have a collective-bargaining agreement with Operating Engineers. The Employer and Laborers, however, are parties to an agreement between the Southern California District Council of Laborers and the Executive Council of the Mason Contractors' Exchange of Southern California, Inc. The agreement describes the duties of a bricktender as including the following:

³ Operating Engineers asserts that the Board should not consider this additional evidence because it constitutes hearsay. The Board has ruled hearsay testimony admissible when it is probative and corroborated by other evidence. See *RJR Communications*, 248 NLRB 920, 921 (1980), *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994), *and Teamsters Local* 705 (Pennsylvania Truck Lines), 314 NLRB 95, 98 (1994). Compare Operating Engineers Local 4 (The Henley-Lungren Co.), 268 NLRB 1227 (1984).

⁴ See Bricklayers Local 15 (Fusco Corp.), 278 NLRB 967, 968 (1986).

⁵ We note that "[t]his reasonable cause standard is substantially lower than that required to establish that the statute has in fact been violated." *Plumbers Local 562 (C&R Heating & Service Co.)*, 328 NLRB 1235 (1999).

Fork lift or conveyer belt or conveying of all material used by the Brick Mason from the first point of delivery to the mechanic whether done manually or by machinery (semi-automatic or automatic hoist, or grout or mortar mixing or pumping machine) or equipment devised to replace the wheelbarrow or buggy. Any device used to transport or install all masonry materials, including, but not limited to, stone and/or prefabricated materials.

Based on the collective-bargaining agreement between the Employer and Laborers, the factor of collectivebargaining agreements favors awarding the work in dispute to employees represented by Laborers.

2. Employer preference and past practice

Winegardner testified that the Employer purchased a crane in 1997 to work on larger masonry projects. Winegardner and Walker both testified that Walker has been employed by the Employer for over 20 years, and that since the Employer purchased the crane in 1997, Walker has been its sole operator. Winegardner testified that Walker has operated the Employer's crane at four other masonry projects.

Winegardner and Bartholomay both testified that it is the preference of the Employer to retain Walker, who is represented by Laborers, as the Employer's sole crane operator. Therefore, this factor favors awarding the work in dispute to employees represented by Laborers.

3. Area and industry practice

John Smith, manager of Laborers, Winegardner, and Robert Long, manager of the Executive Council of the Mason Contractors Exchange of Southern California, Inc., all testified that employees represented by Laborers have operated cranes on other construction sites in the area. According to Jere Meachem, the Director of Labor Relations for the Southern California Contractors Association, Jim Hulse, equipment manager for Brad Crane Service, and Dennis Williams, a field representative for Operating Engineers, it is the general practice in Southern California for masonry contractors to use employees represented by Operating Engineers to operate cranes.

Accordingly, this factor does not favor an award of the disputed work to employees represented by either Laborers or Operating Engineers.

4. Relative skills

Walker testified that he completed a 40-hour crane operation training course in 1980 and completed an 8-hour safety seminar in 1997. Walker further testified that he has been operating cranes for Winegardner for 3 to 4 years, and other witnesses testified that Walker has been operating the Employer's crane since 1997. Bartholomay, the foreman at the site, testified that Walker is able to operate all of the machinery owned by the Employer.

Jim Phillips, a representative of Operating Engineers, testified that Operating Engineers have a state-approved

crane operation apprenticeship program that includes both classroom and on-the-job training. Phillips also testified that there are no licensing requirements for operating a crane in Anaheim, where the site is located.

Operating Engineers concedes that Walker possesses the skills needed to operate the Employer's crane, by asserting that the Employer could continue to have Walker operate the crane as long as he were represented by Operating Engineers. Based on this evidence, we find that this factor does not favor an award of the disputed work to employees represented by either Union.

5. Economy and efficiency of operations

Winegardner testified that it is more economical and efficient to have a bricktender represented by Laborers operate the crane, so that the worker can perform other duties when he is not operating the crane. Winegardner testified that when Walker is not operating the crane, he mixes mud, tends the masons, carries rebar, puts rebar in, vibrates the grout in the walls, helps with the grout nose, runs the pump, tempers the mortar, and makes sure the block is available for the brick masons. Winegardner also testified that even when Walker operates the crane, he sets up his own loads, picks them up, and drops them. Foreman Bartholomay testified that Walker performs many duties in addition to operating the crane, including operating forklifts, mixing mortar, and tending the boards. Walker testified that he operates forklifts, and performs a wide range of duties, from mixing mud to building scaffolds, and performs other bricktending duties when he is not operating the crane. Bradley, the job superintendent for MBK, Inc., testified that Walker is a "general man" and that he performs many duties including operating the forklifts, and preparing grout and mor-

Walker testified that on any given day he might spend anywhere from 15 minutes to the entire day operating the crane, but that on average he probably spends about 30 percent of his time operating the crane. Bartholomay testified that Walker operates the crane anywhere from 1 to 7 hours a day.

Winegardner testified that since the crane is operated on a sporadic basis, an employee whose only job was to operate the crane would have lag time for which he would have to be compensated. Bartholomay also testified that having a person strictly for the purpose of operating the crane would increase costs for Winegardner since the employee would not be able to perform the additional duties performed by Walker. Long testified that employing an engineer to operate the crane would increase costs for Winegardner, since the engineer would

⁶ We note that this concession, first raised at the hearing, does not warrant the conclusion that the dispute is purely representational in nature, where Operating Engineers initially had indicated that Walker should not be performing the work in dispute. Compare *Laborers Local 1 (DEL Construction Co.)*, 285 NLRB 593 (1987).

not be able to perform the many additional duties of a bricktender. Operating Engineers asserts that Walker could continue to perform his current duties, including the operation of the crane, if the Employer signed a collective-bargaining agreement with Operating Engineers.

This factor favors awarding the work in dispute to employees represented by Laborers.

CONCLUSION

After considering all the relevant factors, we conclude that the relevant factors favor an award of the disputed work to employees represented by Laborers. We reach this conclusion relying on collective-bargaining agreements, employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Laborers, not to that Union or its members.

SCOPE OF THE AWARD

The Employer seeks a broad award of the disputed work, covering the operation of the Employer's crane at all future job sites. The Board has held that it will restrict the scope of its determination to a specific job site unless there is evidence that similar disputes may occur in the future. There is no evidence that Operating Engineers has claimed similar work to be performed by the Employer in the future. Further, the evidence does not show that Operating Engineers has a proclivity to engage

in unlawful conduct to obtain work similar to the disputed work.⁸ Accordingly, the present determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

- 1. Employees of Winegardner Masonry, Inc. represented by Southern California District Council of Laborers and its affiliated Locals 220, 300, 439, 507, 585, 591, 652, 783, 802, 806, 1082 and 1184 are entitled to perform the operation of the crane used to move masonry and other supplies at the AMC Theatre construction site located at Disneyland in Anaheim, California.
- 2. International Union of Operating Engineers, Local No. 12 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Winegardner Masonry, Inc. to assign the disputed work to employees represented by it.
- 3. Within 14 days from this date, Operating Engineers Local 12 shall notify the Regional Director for Region 21 in writing whether it will refrain from forcing Winegardner Masonry, Inc. by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

⁷ See Iron Workers Local 1 (Fabcon), 311 NLRB 87, 93 (1993).

⁸ See Electrical Workers IBEW Local 211 (Sammons Communications), 287 NLRB 930, 934 (1987), and IBEW Local 3 (U.S. Information Systems), 324 NLRB 604, 607 (1997)